IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 9, 2009 Session

STATE OF TENNESSEE v. ANDREW BRADLEY SIMPKINS

Direct Appeal from the Circuit Court for Montgomery County
No. 040631 John H. Gasaway, Judge

No. M2008-02607-CCA-R3-PC - Filed March 30, 2010

A jury convicted the petitioner, Andrew Bradley Simpkins, of attempted first degree murder and possession of a prohibited weapon. The trial court sentenced him to an effective twenty-five-year sentence. On direct appeal, this court upheld the convictions and sentences. This court also upheld the habeas corpus court's dismissal of the petitioner's petition for writ of habeas corpus. On this appeal, he asserts that he received ineffective assistance of counsel. Specifically, the petitioner argues that his trial counsel was ineffective because he did not inform the petitioner of a settlement offer, did not move the court to limit his exposure to second degree murder, and he insisted that the petitioner not testify on his own behalf. The petitioner argues that his pretrial counsel were ineffective because they did not file a motion for a speedy and public trial or a motion for change of venue. In addition, the petitioner argues that his sentence is improper. Following a review of the parties' briefs, the record, and applicable law, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. MCLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

Frank J. Runyon, III, Clarksville, Tennessee, for the appellant, Andrew Bradley Simpkins.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Helen Young, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

A jury convicted, the petitioner, Andrew B. Simpkins, of attempted first degree murder and possession of a prohibited weapon. On appeal, this court affirmed the petitioner's convictions. *See State v. Andrew B. Simpkins*, No. M2001-01737-CCA-R3-CD, 2002 WL 1885182, at *1 (Tenn. Crim. App., at Nashville, Aug. 15, 2002) *perm. to appeal denied* (Tenn. Dec. 23, 2002). This court also upheld the habeas corpus court's dismissal of the petitioner's petition for writ of habeas corpus. *See Andrew B. Simpkins v. State*, No. M2008-00195-CCA-R3-HC, 2008 WL 2901614, at *1 (Tenn. Crim. App. at Nashville July 25, 2008) *perm. to appeal denied* (Tenn. Feb. 2, 2009). The following is a summary of the facts of the case taken from this court's opinion on direct appeal:

> The [petitioner], an infantry soldier in the United States Army, met his girlfriend, Genevieve Soler, at a fair in June 1998. In July, the two began dating. Shortly thereafter, Soler told the [petitioner] that her ex-boyfriend, Jesse Lopez, along with two of his friends, had raped her at a party. Soler told the [petitioner] that she was intoxicated and did not remember much of the alleged rape. Over the next few months, the [petitioner] talked with Soler and several others about the rape and his plans to exact revenge on the alleged rapists.
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> Soler testified that after she told the [petitioner] about being raped by Lopez, the [petitioner] talked about the rape almost every day and repeatedly talked about hurting or "taking care" of Lopez. The [petitioner] also asked Soler where Lopez lived.
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> Janet Hern, a close friend of Soler, testified that shortly after the [petitioner] and Soler began dating, the [petitioner] started asking her questions about Lopez, including how he got home from school and if she knew when he would be home alone. The [petitioner] told Hern to get Lopez outside, and he would "take care of the rest." Hern claimed that the [petitioner] called her so often to discuss Lopez that she began avoiding his calls. The [petitioner] told Hern that Lopez "should not live" for raping his girlfriend.
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> Joshua Caleb Sisson, the [petitioner]'s roommate at Fort Campbell from 1998 to 1999, testified that during a road trip to Memphis, the [petitioner] told Sisson that his girlfriend had been raped by her ex-boyfriend. The [petitioner] appeared angry and disgusted and said that people who raped other people should be killed. Throughout the trip, the [petitioner] continued to talk about the rape.

Elan Banks, a former roommate of the [petitioner], testified that the [petitioner] talked about the alleged rape every day and told Banks that he planned to kill the men who raped Soler. On several occasions, the [petitioner] told Banks that he planned to go to Lopez's home, ring the doorbell, and shoot. The [petitioner] asked Banks to help him get a gun so that he could shoot the alleged rapists. He also asked Banks to ride by Lopez's house with him.

On January 15, 1999, four days before Lopez was shot, the [petitioner] purchased a 12-gauge shotgun at Wal-Mart. The sales associate at Wal-Mart completed a firearms transaction report for a New England Farms Model SB1-101 shotgun. The associate obtained purchase approval through the Tennessee Bureau of Investigation (TBI) instant check at 4:57 p.m. The serial number for the [petitioner]'s gun was NM363294.

The [petitioner] then went to a nearby retail store, Grandpa's, to purchase shells for the shotgun. A systems analyst at Grandpa's was able to match a receipt recovered during the investigation with the date and item purchased. The receipt indicated that 12-gauge game load, number six bird shot, was purchased on January 15, 1999 at 5:28 p.m. The analyst testified that Grandpa's is located down the street from the Wal-Mart store where the [petitioner] purchased the gun. She also testified that Grandpa's is an Ace Hardware dealer and uses Ace Hardware sacks.

Two days later, two of the [petitioner]'s friends, Elliott Tso and Kee Blackwater, visited the [petitioner]'s room. At that time, they saw the [petitioner] sawing on a shotgun. Blackwater heard the [petitioner] ask Tso to help him stake out Lopez's house.

The day before the shooting, the [petitioner] displayed a sawed-off shotgun to at least two people. Soler testified that the [petitioner] produced a short, black shotgun and said he intended to go to Lopez's house and scare him with it. Banks testified that, while riding in the [petitioner]'s car, the [petitioner] pulled a sawed-off shotgun from under the seat and placed it in Banks' lap.

On January 19, 1999, the day of the shooting, the [petitioner] finished work around 4:30 p.m. Afterwards, he was required to attend a "GI Party," which is essentially a cleaning session at the barracks. Around 6:00 p.m., Soler talked with the [petitioner] on the phone. The [petitioner] asked Soler to call Lopez's house to see if he was home. While talking to the [petitioner], Soler

heard him tell his superiors that he had to leave the GI party to take Soler to the hospital, although Soler did not actually need to go to the hospital. Because Soler was unwilling to call Lopez herself, she asked her friend, Johanna Paschall, to make the call. Paschall called Lopez and asked for "Rick." She then called Soler and said that she made the call, but did not know who answered the phone. Soler called the [petitioner] and told him that Lopez was not home, but that his parents were.

Jesse Lopez recalled receiving a phone call around 7:00 p.m. the night of the shooting. Lopez testified that the caller asked for someone who did not live at the Lopez residence. Less than half an hour later, at 7:22 p.m., the doorbell rang at the Lopez's house. Expecting a visit from his friend, Michael, Lopez ran past his mother to answer the door. As he opened the door, he was shot in the face. Lopez did not see who was at the door and did not remember being shot.

Around 8:00 p.m., Soler and the [petitioner] met at Paschall's house. Soler later told detectives that the [petitioner] was acting strangely. She reported that he was unusually quiet and asked Soler to hug him.

After meeting with Soler, the [petitioner] returned to the barracks to see Elliott Tso. Tso testified that the [petitioner] arrived around 10:00 p.m. The [petitioner] told Tso, "I got one." He said that he knocked on the door, shot the first person that answered, and ran. The [petitioner] told Tso that the person he shot was Lopez. He asked Tso if he would take the gun, but Tso refused. The [petitioner] then told Tso that he had put the shotgun shells in the back of Tso's truck. Tso found and removed the shells from an Ace Hardware sack. Tso testified that he and the [petitioner] were close friends and that he was unsure of what to do. Tso decided to turn the shells over to detectives and to allow them to search his truck.

Investigators testified that they interviewed the [petitioner] the day after the shooting. Initially, the [petitioner] told detectives that he did not own a shotgun. He also said that during the time the shooting occurred, he had gone to a shoppette on the Kentucky side of the Fort Campbell post to purchase a sandwich, chips, a snack cake, and a drink. After reviewing the sales receipts from this particular shoppette, detectives were unable to corroborate the [petitioner]'s purchases. They also became aware of his gun purchase. In a second interview, the [petitioner] admitted to purchasing the shotgun, but claimed it was stolen from his car on the same day it was purchased. The

[petitioner] did not report the gun stolen. During this interview, the [petitioner] maintained that he had gone to the shoppette at the time of the shooting.

The Clarksville Police Department, along with investigators from the United States Army Criminal Investigation Command (CID), conducted a search of the barracks and the surrounding areas. Underneath a military conics, a steel storage container resembling a dumpster, located twenty-three to thirty feet from the building in which the [petitioner] lived, investigators found a bag containing a shotgun. The gun had been wrapped in felt similar to that found in a military-issue blanket. The shotgun was a New England Farms firearm 12-gauge, the same type the [petitioner] purchased at Wal-Mart only days before the shooting, with a partial serial number of NM 36. The remainder of the serial number had been destroyed. However, the TBI was able to restore seven of the eight digits of the serial number on the shotgun. With the exception of the single missing digit, the restored number matched the serial number on the [petitioner]'s shotgun. Inside the [petitioner]'s room, investigators found a notepad with the names of the three alleged rapists. Lopez's phone number was written beside his name. From Elliott Tso's truck, detectives recovered a plastic Ace Hardware sack, similar to those used at Grandpa's, containing the receipt for shotgun shells purchased at Grandpa's. They also discovered a silver hacksaw similar to the one Tso and Blackwater saw the [petitioner] using to saw on the shotgun. Tso led investigators to the actual shells that the [petitioner] left in his truck. The TBI concluded that shot and wadding recovered from the crime scene was consistent with the size and weight specification of the shells recovered from Elliott Tso's truck.

While incarcerated, the [petitioner] told another inmate, Kenneth Buckler, about the shooting. According to Buckler, the [petitioner] claimed that he shot someone in the face because the victim and some other people had raped the [petitioner]'s girlfriend. The [petitioner] told Buckler that he was angry, that he had planned the shooting, and that he had staked out the victim. He said that he had sawed off a shotgun, gone to the victim's home, knocked on the door, and shot as soon as the victim answered. The [petitioner] told Buckler that he cleaned off the gun, wrapped it in a poncho liner, and placed it under the barracks.

*Simpkins, 2002 WL 1885182, at *1-4.*

After hearing the evidence, the jury convicted the petitioner on both counts in the indictment. The trial court sentenced the petitioner to twenty-five years for the criminal attempt to commit first degree murder conviction and two years for the possession of a prohibited weapon conviction and ordered that the petitioner serve them concurrently. The petitioner appealed his conviction, and this court affirmed the judgments of the trial court. The petitioner filed a petition for writ of habeas corpus relief, which the habeas corpus court dismissed. On appeal, this court also upheld the habeas corpus court's dismissal of the petition.

On July 14, 2003, the petitioner timely filed a *pro se* petition for post-conviction relief. Afterwards, the court appointed post-conviction counsel, however, that counselor eventually withdrew from representation and the court appointed current counsel to represent the petitioner. Post-Conviction Counsel filed second and third amended petitions for post conviction relief, and the post-conviction court held an evidentiary hearing on the merits of the petitioner's claim on February 28, 2008. The parties presented the following evidence at the hearing.

Assistant District Attorney General Helen Young testified that she prosecuted the petitioner's case. She recalled that the petitioner's first defense attorney[1], Pre-Trial Counsel, approached her and asked if she would make a settlement offer to the petitioner. General Young said that she "related to him that any offer that [she] made would be predicated upon the [petitioner] giving enough evidence to charge and convict his girlfriend and that the only consideration that [she] would probably be willing to give for that is [to] agree to cap it at fifteen to twenty . . . ." Pre-Trial Counsel rejected her offer, and neither she nor the district attorney's office offered another settlement. On cross-examination, General Young testified that it was her opinion that the petitioner's girlfriend manipulated the petitioner into committing the shooting and that was why she wanted information about the girlfriend.

Trial Counsel testified that he represented the petitioner in the first degree murder case that was the subject of the post-conviction hearing. Before his representation, the petitioner had other attorneys at the circuit court and general sessions court levels. Trial Counsel stated that he contacted the petitioner's previous counsel and obtained the petitioner's file. Trial Counsel could not recall if the petitioner explained the difficulties he had with his previous counsel or had filed a complaint against his previous counsel with the Board of Professional Responsibility. Trial Counsel remembered discussing settlement offers with the petitioner and said the petitioner told him that the state made an offer at the general sessions level. Trial Counsel did not recall the substance of the offer. He also did not recall General Young

[1] The petitioner had several attorney's during his case. Throughout this opinion, we will refer to them as Appointed Counsel, Pre-Trial Counsel, Trial Counsel, and Post-Conviction Counsel.

formally offering the petitioner, as a settlement, the chance to plead guilty to second degree murder in exchange for his testimony against his girlfriend.

Concerning the petitioner not testifying on his own behalf, Trial Counsel did not remember conversations with the petitioner about whether he would testify, the petitioner insisting he wanted to testify, or eliciting help of the petitioner's family and friends to persuade the petitioner not to testify. He further testified that he did not recall telling the petitioner that if he testified the jury would be upset when they learned his motive for shooting the victim. Trial Counsel stated that he told the petitioner that he did not think that it was in his best interest to testify. He further stated that no other witness saw the shooting occur. Trial Counsel did not know of any criminal convictions or conduct that the state could have used to impeach the petitioner at trial. However, Trial Counsel stated that during the sentencing hearing, the victim testified that the petitioner had confronted him before the shooting. Trial Counsel testified that he did not remember the petitioner being questioned at the sentencing hearing about stabbing another soldier.

Regarding the jury instructions, Trial Counsel stated that he remembered that "there were instructions that . . . instructed all the way from attempted first-degree murder down to assault." Trial Counsel did not recall making an objection to that charge. Trial Counsel stated that he did not believe the petitioner mentioned that he was taking Larium before the trial. Trial Counsel never heard the petitioner admit that he committed the crimes and "it appeared to [him] that [the petitioner] was trying to assert factual innocence up until after he was convicted." Trial Counsel stated that he did not recall whether he and the petitioner discussed filing a motion for speedy trial or if the petitioner asked him to file the motion. Trial Counsel further stated that he reviewed the petitioner's court file but did not recall whether the petitioner wrote letters to the court clerk. When shown a letter that the petitioner had written to the clerk, Trial Counsel said that he remembered seeing the letter, though he did not remember whether the petitioner asked for a speedy trial.

Trial Counsel testified that he did not object to the trial court's application of enhancement factors to the petitioner. He said that he did not object because he did not "believe there was any case law that said that the sentencing scheme at the time violated confrontation, so [he] didn't make those objections." After the court appointed the petitioner's post-conviction counsel, Trial Counsel contacted the petitioner's new counsel to inform him about the *State v. Schiefelbein*[2] case. Trial Counsel also informed Post-

[2] See State v. Schiefelbein, 230 S.W. 3d 88, 150 (Tenn. Crim. app. 2007) (holding that the trial court's use of statutory enhancement factors to increase sentence length to the maximum range violated the 6th Amendment right to trial by jury).

Conviction Counsel that, under that case, the petitioner may have a potential post-conviction claim for Trial Counsel's failure to object to the enhancement factors.

Trial Counsel further testified that he did not recall objecting to the indictment in the petitioner's case or informing the court that the indictment did not include the premeditation element. Trial Counsel stated that, from the indictment, he learned that the state was alleging that the petitioner intentionally killed the victim. He agreed that the indictment did not contain any allegation of premeditation and he did not recall whether he told the petitioner that premeditation was an element of first degree murder. Trial Counsel stated that he did not make a motion to amend or dismiss the indictment. Trial Counsel further stated that the indictment did not specifically say that the petitioner used a gun, and it referred only "to a short barrel length of less than eighteen inches and that the weapon was less than twenty-six inches overall."

On cross-examination, Trial Counsel testified that he did not have a settlement offer to present to the petitioner. He further testified that if he had an offer, he would have informed the petitioner. He stated that when he spoke to the petitioner about his case, "[the petitioner] tried to provide an alibi." Trial Counsel stated that Ms. Solar was an alibi witness, but he could not recall whether she testified that the petitioner had discussed hurting the victim. Trial Counsel also stated that Ms. Solar's friend, Janet Hearn, was an alibi witness. Trial Counsel did not remember if Ms. Hearn testified that the petitioner requested that she get the victim outside and that she avoided the petitioner's calls because he called her so much. Trial Counsel recalled Joshua Sisson's testimony that the petitioner said that "something needed to be done about the victim and some other people allegedly raping his girlfriend." He also recalled the name of Mr. Banks, who was a witness at trial, but he did not recall Mr. Bank's testimony that the petitioner talked about killing the people responsible for raping his girlfriend daily. Trial Counsel remembered testimony that petitioner "planned to go to [the victim's] home, ring the bell and then shoot." He also remembered testimony that the petitioner asked Banks to ride by the victim's home, but he could not recall if it was Banks who gave that testimony.

Trial Counsel remembered that a "jailhouse informant," Mr. Buckler, testified that the petitioner "was angry, planned the shooting, stake[d] out the victim, got the sawed off shotgun, went to his home, knocked on the door and as soon as the victim answered the door, [the petitioner] shot him." However, Trial Counsel testified that Mr. Buckler's testimony seemed to come from news coverage of the incident, and Trial Counsel had "a lot of doubt" concerning Mr. Buckler's testimony. Trial Counsel stated that testimony at the petitioner's trial established that the petitioner had bought a shotgun and shotgun shells less than a week before the shooting. He further stated that someone testified that the petitioner "came to his residence after the shooting and described what occurred and asked him to hold something

. . . ." Trial Counsel testified that before trial, he and General Young reviewed their files, and General Young gave him any documents that he did not have. He further testified that he was on notice that the state was alleging that the petitioner used a sawed-off shotgun and that they were pursuing a theory of premeditated murder.

Trial Counsel said that a tornado hit the area a couple days after the shooting, and it overshadowed the incident in the media. He was not aware of any pre-trial media attention and did not see the need for a change of venue. Trial Counsel stated that he advised the petitioner not to testify at his trial because the petitioner's testimony and the testimony of the alibi witnesses would have placed the petitioner at the scene of the shooting when it happened. In addition, the petitioner's potential testimony varied from his previous statements. According to Trial Counsel, after he gave the petitioner advice about whether to testify, the petitioner decided not to testify. When asked why he did not object to the trial court's aggravated assault lesser included offense instruction, Trial Counsel responded, "Actually, I thought it was . . . awesome to get that instruction considering the evidence that was presented."

Debra McClanahan, the petitioner's mother, testified that after the state charged the petitioner with attempted first degree murder, she helped him retain his first attorney, Pre-Trial Counsel. She spoke with Pre-Trial Counsel on the phone twice and went to speak to him in person "because he wouldn't return calls." She expressed her concern about his lack of communication, and he withdrew from representation of the petitioner. She stated that she had paid Pre-Trial Counsel around $10,000, and he returned approximately $8,000 to her.

Based on the military base's recommendation, Ms. McClanahan retained Trial Counsel to represent the petitioner. Ms. McClanahan spoke with Trial Counsel multiple times before she retained him, and she communicated with him, primarily via email, several times before the petitioner's trial. Ms. McClanahan testified that Pre-Trial Counsel told her about a settlement offer from the state that would drop the petitioner's charges down to aggravated assault. When the petitioner retained Trial Counsel, Ms. McClanahan asked him about the offer, and he told her that "he would look into it, but he didn't have any knowledge of [it]."

Ms. McClanahan recalled visiting the petitioner in jail before his trial. During her visit she cried and begged the petitioner not to testify. She stated that the petitioner was adamant about testifying, and Trial Counsel was adamant about the petitioner not testifying. She further stated that Trial Counsel told her that testifying would not be beneficial for the petitioner, and he asked her to convince the petitioner to listen to him.

Ms. McClanahan stated that during the trial, the petitioner was still adamant about testifying in his own defense. After the state closed its proof, Trial Counsel spoke with Ms. McClanahan and Ms. Carolyn Comer, a family friend. Trial Counsel told Ms. McClanahan that the petitioner was "a little upset" because Trial Counsel did not want him to testify. Trial Counsel further told Ms. McClanahan that the petitioner would get sentenced to more time if he testified. At Trial Counsel's request, Ms. McClanahan wrote the petitioner a note and told him to "just do what your lawyer says." Ms. McClanahan said that the petitioner waived his right to testify. She stated that when the petitioner was advising the court that he wanted to waive his right to testify, "he looked down, kind of like submission . . . ."

After the trial, Ms. McClanahan and Ms. Comer met with Trial Counsel and his assistant, Ms. Dagmar. According to Ms. McClanahan, during this meeting Trial Counsel informed her that the petitioner should file a claim for "inadequate counsel . . . because during the time, [Trial Counsel and the petitioner] had meetings . . . [Trial Counsel] was having some personal issues . . . [and] there [were] a couple of meetings that he had to bow out on[.]" Ms. McClanahan testified that Trial Counsel said he would not contest the claim and would even testify if needed.

Ms. McClanahan stated that she discovered information about a pharmaceutical product that the petitioner had taken. She printed an article from a website and gave it to Post-Conviction Counsel. Ms. McClanahan said that during the summer and fall of 1998, the petitioner was in Panama. When he returned, he had "mood swings, irritation, [and] it seemed like he had trouble sleeping . . . ."

On cross-examination, Ms. McClanahan agreed that the petitioner's first lawyer "made it perfectly clear to [her]" that the state made a settlement offer to the petitioner. She asked the lawyer why the petitioner would need to settle if he did not do anything, and he advised her to talk to the petitioner about the offer. Ms. McClanahan said that when she spoke to the petitioner about the offer, "he didn't know what [she] was talking about." She testified that from the lawyer's phone call, it was clear that the lawyer believed he had told the petitioner about the offer.

Carolyn Comer testified that she had known the petitioner since she taught at his school when he was around thirteen or fourteen years old. She recalled helping in the preparation of the petitioner's trial and observing the trial in the courtroom. She stated that she was present during a conversation at the courthouse in which the petitioner and Trial Counsel discussed whether the petitioner would testify. Ms. Comer said that the petitioner wanted to testify, but Trial Counsel told him that he would receive a longer sentence if he testified. She also said that after he received his attorney's advice, the petitioner still wanted to testify. Ms. Comer stated that when the petitioner told the court that he did not want to

testify, his demeanor was "like [when] you tell a child that they can't do something or that they have to apologize for something and they apologize, but it is not because they want to, it's just because that's what they have to do[.]" She further stated that the petitioner did not make eye contact when he came in the courtroom, and she could tell that he was upset by the way he carried himself. She said that after the petitioner told the judge he did not want to testify, she said to Ms. McClanahan, "We messed up, we should have let him testify." Ms. Comer testified that during a meeting with Ms. McClanahan and Trial Counsel, Trial Counsel told them that the petitioner could file a motion for a new trial because his sick child preoccupied him, and he did not represent the petitioner the way he should have.

The petitioner testified that while in the General Sessions Court, before he hired Trial Counsel, he had a court appointed attorney. He said that Trial Counsel, "didn't really want to discuss the case" when they met, and Trial Counsel infrequently responded to his letters. He also said that Trial Counsel"wouldn't want to come see [him] when [he] requested . . . ." When the petitioner asked Trial Counsel about a settlement date, Trial Counsel did not tell him anything and said that he did not know anything about it. Trial Counsel asked the petitioner what charges he would plead to and the petitioner said that he "would prefer that the [s]tate make an offer." Trial Counsel told the petitioner that he would get back to him after he spoke with the prosecutor. Because of his communication problems with Trial Counsel, the petitioner filed a complaint with the Board of Professional Responsibility, and Trial Counsel withdrew his representation of the petitioner. The petitioner recalled writing one letter to the Board of Professional Responsibility.

The petitioner testified that when he hired Pre-Trial Counsel he "immediately" requested that he file a motion for a speedy trial, but Pre-Trial Counsel did not file the motion. He stated that he wanted a speedy trial because "[he] was sitting in jail and [his] son was about to be born and . . . [he] had already been discharged from the military and [he] was just wanting them to hurry up and either convict [him] or let [him] go." The petitioner said that being incarcerated caused him "great concern" about his child and his child's mother. The petitioner also asked Pre-trial Counsel for discovery, and he received it "several months later." The petitioner testified that he requested Pre-Trial Counsel to file a motion to change the trial venue. He further testified that Pre-Trial Counsel responded that "asking for a change of venue is like asking for a pig with wings" and told him to forget about the motion. On October 19, 1999, the petitioner wrote a letter to Pre-Trial Counsel complaining about the way he was representing the petitioner and asking about a settlement, a trial date and discovery. The petitioner did not recall Pre-Trial Counsel responding. The petitioner also sent letters to Judge Gasaway and the Circuit Court Clerk. When he retained Trial Counsel, the petitioner also asked him to file motions for a speedy trial and change of venue. According to the petitioner, Trial Counsel would always say that "he would look into that . . . ."

Before the jury convicted the petitioner, none of the petitioner's counsel conveyed a settlement offer to him. After the jury convicted him, the petitioner asked Trial Counsel why the petitioner had not received a settlement offer. According to the petitioner, Trial Counsel told him that the District Attorney offered to charge the petitioner with attempt to commit second-degree murder in return for his testimony against his fiancée, Ms. Solar. The petitioner told Trial Counsel that the offer was "crazy" because Ms. Solar was innocent. Trial Counsel advised the petitioner that was why he did not convey the offer. The petitioner told Trial Counsel that he should have informed the petitioner about the offer so that they could have further negotiated with the state. The petitioner said that Trial Counsel seemed "upset at [him]" after this because the petitioner had yelled at him.

The petitioner stated that during trial and his sentencing hearing, a witness stated that the petitioner had previously stabbed a soldier. The petitioner was upset because "it had prejudiced [him] in the eyes of the jury for something that [he] was never convicted of." According to the petitioner, Trial Counsel should have made it clear to the jury that he only held a knife to the soldier's neck and did not stab him.

The petitioner said that Trial Counsel failed to assist him when he did not pursue the petitioner's use of Larium as a possible defense. The petitioner discovered that the military had given him Larium, an anti-malaria pill, and he also discovered an article about the effects of the pill. He brought his discoveries about Larium to Trial Counsel's attention, but Trial Counsel did not pursue the issue. The state stipulated that the military gave the petitioner Larium in the fall of 1998. The petitioner said that the Larium changed his behavior, and people thought he was abusing drugs because of the change. The petitioner said that he was "very agitated, paranoid, angry, very frustrated[, and] out of control"and it took "a lot of strength just to . . . maintain some sort of sanity." According to the petitioner, he felt like he "was going crazy."

The petitioner complained that Trial Counsel should have assigned an investigator to his case. The petitioner had potential witnesses that he wanted interviewed before trial; however, they spoke Korean, and a translator would have been necessary. Trial Counsel told the petitioner that they did not have the money to hire a translator and refused to allow the petitioner's future in-laws to translate.

The petitioner stated Trial Counsel should have objected when the trial court sentenced him. The petitioner complained that Trial Counsel should have objected to the trial court finding enhancement factors and raising mitigating factors. The petitioner also stated that Trial Counsel should have moved to dismiss the indictment or limited his exposure to second-degree murder because the state did not allege premeditation in the indictment.

The petitioner said that he told Trial Counsel that he wanted to testify so that he could tell the jury his side of the story. No one else at the scene of the shooting could present the petitioner's theory of what happened when he shot the victim or testify about the petitioner's previous encounters with the victim. He stated that he wanted to explain what he did and why he did it. The petitioner wanted to tell the jury that he was "innocent of attempted murder, but [he] shot [the victim]." The petitioner told Trial Counsel his intended testimony regarding what happened the night of the shooting. After hearing the petitioner's potential testimony, Trial Counsel advised the petitioner that

> if [he got] on that stand and [told] the jury what [the petitioner] just told [him,] that [the petitioner] shot this guy, because [he] wanted to cripple him and disfigure him, for the rest of his life, . . . the jury is going to give [the petitioner] more time for that than if they think [he was] trying to kill [the victim].

The petitioner said that what Trial Counsel said did not make sense to him, and Trial Counsel explained that juries are "very emotional" and that they would "hang" the petitioner if he gave that testimony. The petitioner stated that after he told Trial Counsel that he still wanted to testify, Trial Counsel asked the petitioner's family to convince him not to testify.

The petitioner stated that his mother visited him in jail and begged him not to testify. He stated that she told him to trust her and that Trial Counsel was "working on something," and if he testified, he was "going to mess up everything that [Trial Counsel was] doing." The petitioner promised his mother that he would not testify.

On cross-examination, the petitioner testified that he told Pre-Trial Counsel that he intended to "mutilate" or "disfigure" the victim. He said that Pre-Trial Counsel advised him to "never say that to a jury or to any other prisoners . . . ." The petitioner said that he disputed Trial Counsel's testimony that the petitioner gave him an inconsistent and incoherent account of the event and did not inform Trial Counsel of his Larium use. The petitioner said that Pre-Trial Counsel did not try to get him to take the state's settlement offer. The petitioner disputed that state's theory that he was obsessed with his girlfriend's rape and that she manipulated him into shooting the victim. The petitioner agreed that his testimony regarding the event was inconsistent with the testimony at the jury trial. The petitioner stated that he asked Trial Counsel to object to the enhancement factors after trial. After discussing his sentencing with a fellow inmate, the petitioner told Trial Counsel "about the Judge using the fact of [his] Article 15 and the fact that [he] had no prior criminal convictions . . . ."

Based on the evidence presented at the hearing, the post-conviction court denied post-conviction relief. The post-conviction court found that the petitioner's counsel did not commit any unprofessional error, and there was "no reasonable probability of such error undermining confidence in the verdict." The court commented that "trial defense counsel did a very effective job of defending petitioner at the jury trial of this matter." The petitioner has appealed the decision of the post-conviction court.

Analysis

On appeal, the petitioner argues that Pre-Trial Counsel and Trial Counsel were ineffective for failing to file motions for a change of venue and for a speedy and public trial as the petitioner requested. The petitioner further argues that Trial Counsel was ineffective because he (1) failed to inform the petitioner about a settlement offer from the district attorney; (2)failed to limit the petitioner's exposure to attempted second degree murder; and (3) insisted that the petitioner not testify on his own behalf. Lastly, the petitioner asserts that the enhancement factors found by the trial court at sentencing resulted in an improper sentence. Upon review of the record, we conclude that the petitioner failed to show that he was denied the effective assistance of counsel or that the trial court committed error.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations of fact set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is *de novo* with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is *de novo* without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's

challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland* at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Id.* at 697; *see also Goad*, 938 S.W.2d at 370 (Tenn. 1996). If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697.

The petitioner contends that both Pre-Trial Counsel and Trial Counsel were deficient for failing to file motions for a change of venue and a speedy and public trial. The petitioner testified that he requested that both Pre-Trial Counsel and Trial Counsel file motions for change of venue and a speedy and public trial. Trial Counsel did not recall the petitioner requesting that he file such motions. The petitioner requested the motions because of the pending birth of his son, his discharge from the military, and because he was anxious and concerned about the trial. The petitioner did not present any evidence that such motions were proper or that the failure to file the motions rendered his trial unfair or unreliable. The post-conviction court found that the petitioner did not show a basis for granting a motion for change of venue. The post-conviction court did not make a specific finding regarding the failure to file a motion for a speedy trial. However, the court found that, overall, counsel was not deficient. The evidence does not preponderate against the findings of the post-conviction court. We conclude that the petitioner has not shown that failure to file the requested motions fell below the objective standard of reasonableness, or that but for counsel's failure to file the motions, the outcome of the trial would have been different.

The petitioner also contends that Trial Counsel did not inform him of a settlement offer from the District Attorney before trial. General Young made a settlement offer to Pre-Trial Counsel, which Pre-Trial Counsel rejected. Trial Counsel testified that General Young never conveyed an offer to him. General Young testified that after Pre-Trial Counsel rejected her offer, neither she nor the district attorney's office made any subsequent offers of settlement. The evidence shows that General Young made an offer to Pre-Trial Counsel, and she made no offer to Trial Counsel. The post-conviction court found that the state did not extend a settlement offer to Trial Counsel, and therefore, Trial Counsel was not deficient in this regard. We agree. Trial Counsel cannot be ineffective for failing to present the petitioner with an offer that the state never extended. Furthermore, even if counsel was deficient in this regard, the petitioner has not shown that counsel's deficiency prejudiced him

because he testified that if he had received the offer, he would have rejected it. We conclude that the petitioner has not shown either a deficiency in counsel's performance or any resulting prejudice to his case.

The petitioner asserts that Trial Counsel rendered ineffective assistance when he failed to limit the petitioner's exposure to attempted second degree murder and did not object to the wording in the indictment. The petitioner's indictment for first degree murder did not include the element of premeditation, and the petitioner argues that counsel was ineffective for not challenging it. The post conviction court found that the indictment had no error, and we agree. The petitioner previously challenged his indictment in a habeas corpus petition, and this court affirmed the denial of that petition. This court held that the counts of the indictment met the minimum constitutional and statutory requirements, and the indictment was valid. *Simpkins,* 2008 WL 2901614, at *1. Accordingly, we conclude that Trial Counsel was not ineffective for failing to challenge the valid indictment.

The petitioner claims that Trial Counsel was ineffective for insisting that the petitioner not testify on his own behalf. Trial Counsel testified that he did not want the petitioner to testify because the testimony would place the petitioner at the scene of the shooting. In addition, Trial Counsel thought that if the petitioner testified that he intended to disfigure the victim rather than kill him, then the jury would give the petitioner a longer sentence. After Trial Counsel gave the petitioner the advice about not testifying, he still wanted to testify. It was when the petitioner's mother begged him not to testify that the petitioner decided that he would not testify in his own defense. The post-conviction court found that Trial Counsel did not prevent the petitioner from testifying, and thus, he was not deficient in that regard. Further, the trial court examined the petitioner regarding his right to testify, and the petitioner voluntarily waived his right to testify at trial. We agree with the post-conviction court's finding and conclude that Trial Counsel was not ineffective for advising the petitioner that he should not testify. The petitioner is not entitled to relief for this issue.

Finally, the petitioner argues that the trial court violated his Sixth Amendment right to a trial by jury when it applied enhancement factors to the petitioner's sentence that were neither found by a jury nor admitted by the petitioner. On September 8, 2000, the trial court sentenced the petitioner to an effective twenty-five year sentence to be served in the Tennessee Department of Correction The petitioner claims that the trial court's use of the statutory enhancement factors violated the petitioner's Sixth Amendment right to a jury trial pursuant to *State v. Schiefelbein,* 230 S.W.3d 88 (Tenn. Crim. App. 2007), *Blakely v. Washington,* 542 U.S. 296 (2004), and *Cunningham v. California*, 549 U.S. 270 (2007). The post-conviction court found that the petitioner should have addressed this matter on direct appeal. The post-conviction court ruled that the issue was not properly before it because the petitioner waived it. This court has repeatedly held that *Blakely* does not apply retroactively

on collateral review. *See Travis J. Woods v. State,* No. E2007-02379-CCA-R3-PC, 2009 WL 723522 (Tenn. Crim. App. at Knoxville March 18, 2009) *perm. app. denied* (Tenn. 2009). We note that the petitioner mentioned counsel's failure to object in his brief, however, it is unclear whether the petitioner is also alleging that Trial Counsel was ineffective for failing to object to the trial court's application of enhancement factors not found by the jury or admitted by the petitioner. In any regard, the United States Supreme Court decided *Blakely* almost three years after the trial court sentenced the petitioner, so Trial Counsel's failure to object to the sentencing scheme that was valid at that time was not deficient performance. We conclude that the petitioner's claims based on the rule established in *Blakely* are without merit, and the petitioner is not entitled to relief.

Conclusion

Based on the foregoing, we affirm the judgment of the post-conviction court.

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J.C. McLIN, JUDGE